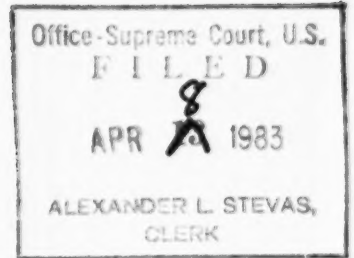


82-1706



No.

In The

Supreme Court of the United States

Term, 1983

Estate of Jane B. Ceppi, Deceased,
Peter B. Ceppi, Executor
Petitioner

v.

Commissioner of Internal Revenue,
Respondent

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

Petition for Certiorari

Brian G. Bardorf
G. Quentin Anthony, Jr.
47 Long Wharf Mall
Newport, Rhode Island 02840
401-847-6000

QUESTIONS PRESENTED

Whether the retroactive application of Section 702(f) of the Revenue Act of 1978, Pub. L. 95-600, 92 Stat. 2930 (1978), is violative of the Fifth Amendment to the United States Constitution.

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Opinions Below

The opinion of the United States Tax Court is reported at 78 T.C. 320. The opinion of the United States Court of Appeals for the First Circuit is reported at 698 F.2d 17.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was made and entered on January 11, 1983, and a copy thereof is appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 48 U.S.C. 1254(1).

Statement

The Petitioner in this matter is the Estate of Jane B. Ceppi, represented by its executor, Peter B. Ceppi. Jane B. Ceppi died on January 15, 1978. Ten days prior to her death, she made eight gifts to eight different relatives. Each gift consisted of 75 shares of Dome Mines stock and 20 shares of Texas Instruments, and each gift had a value of \$6,477.75 on January 5, 1978 and \$6,585.00 on January 15, 1978.

The Petitioner has admitted that the value of the stock transferred is properly includable in the gross estate of the decedent, but the Petitioner has maintained that \$3,000.00 per donee is exempted from that value. The validity of the Petitioner's position turns on the proper interpretation of Section 2035(b)(2), as amended by the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, The Revenue Act of 1978, Pub. L. 95-600, 92 Stat. 2753, and the Technical Corrections Act of 1979, Pub. L. 96-222, 94 Stat. 194. (1980).

When the Executor of the estate filed the federal estate tax return, he claimed that \$3,000.00 of each gift was excludable under §2035(b)(2). As amended by the Tax Reform

Act of 1976, §2035(b)(2) negated the inclusion rule of 2035(a) with respect to:

any gift excludable in computing taxable gifts by reason of section 2503(b) (relating to \$3000 annual exclusion for purposes of the gift tax) determined without regard to section 2513(a).¹

In effect, the executor took the position that read in conjunction these sections authorize a "subtraction out" interpretation whereby the first \$3,000 of each gift was excludable from the gross estate. The Internal Revenue Service denied the exclusion on the ground that these sections only authorize a "de minimus" interpretation of 2035(b)(2) under which no portion of gifts to a donee, which in a calendar year exceed a total of \$3,000 is excludable.

¹Section 2503(b) provides: In computing taxable gifts for the calendar quarter, in the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1971 and subsequent calendar years, \$3,000 of such gifts to such person less the aggregate of the amounts of such gifts to such person during all preceding calendar quarters of the calendar year shall not, for purposes of subsection (a), be included in the total amount of gifts made during such quarter.

On November 6, 1978, the President approved the 1978 version of §2035(b) (2) which clearly adopts the de minimis theory.² Moreover, Congress provided that the 1978 version applies retroactively to all gifts made on or after January 1, 1977. Congress eventually enacted the Technical Corrections Act of 1979, Pub. L. No. 96-222, 94 Stat. 194 (1980), which allows election of the subtraction out method for gifts made in 1977. However, it left untouched the retroactive application of the 1978 de minimis theory to the gifts presently in issue.

Because the executor excluded from the gross estate \$3,000 from each of the gifts in question, the Internal Revenue Service found a deficiency of \$7296.00. The taxpayer filed a petition in the Tax Court to redetermine the deficiency. The taxpayer asserted two basic contentions. The first contention was that the 1976 version of §2035(b) (2) adopted the subtraction out theory. The second contention was that the retroactive application of the de minimis theory as embodied in 1978 version violated the Due Process Clause of the Fifth Amendment.

²The 1978 version provides an exclusion to any gift to a donee made during a calendar year if the decedent was not required by section 6019 to file any gift tax return for such year with respect to gifts to such donee.

The Tax Court ruled that the 1976 version of 2035(b)(2) adopted the de minimis theory, and, consequently, the Tax Court did not address the constitutional issue.

The petitioner properly appealed the decision of the Tax Court to the United States Court of Appeals for the First Circuit. The Court of Appeals ruled that the first contention of the petitioner was correct. That is, the Court ruled that the 1976 version of 2035(b)(2) authorized the subtraction out approach urged by the petitioner. As a result, the Court of Appeals reached the constitutional issue contained in the petitioner's second contention, viz, that the retroactive application of the 1978 version violated due process. Addressing this issue, the Court ruled that the 1978 version did not violate due process standards.

The Court of Appeals said the correct resolution of the issue of retroactivity devolved upon a proper reading of three cases: United States v. Darusmont, 449 U.S. 292 (1981) (per curiam); Milliken v. United States, 283 U.S. 15 (1931); and Untermeyer v. Anderson, 276 U.S. 440 (1928). Although not expressly stated in the decision, it would seem that the Court of Appeals found that retroactive application of the 1978 version of 2035(b)(2) was supported by either the reasoning in Milliken or Darusmont.

The Court of Appeals cited a series of cases which seemed to indicate that Milliken limited the holding in Untermeyer. In Untermeyer, a gift had been made in 1924 while a bill that would tax it was pending in Congress. The statute, eventually enacted, created a new tax on inter vivos gifts and had retroactive application. The Court held that the retroactive application of this new inter vivos gift tax violated due process. On the other hand, in Milliken a donor made inter vivos gifts at a time when an estate tax on gifts in contemplation of death was in effect. At a time after the gifts had been made Congress enacted an increase in the estate rates on such gifts and made the increased rate retroactive. The Court held that this retroactive application was constitutionally permissible.

Numerous cases have indicated, and the Court of Appeals so indicated, that Untermeyer when read in view of Milliken, stands only for the proposition that a wholly new gift tax cannot be applied retroactively. Accordingly, since the gifts in the instant matter were includable in the gross estate, the Court of Appeals concluded that Milliken should control. Although Milliken involved an increase in the rate and the instant matter involved an increase in the base, the Court of Appeals ruled the result, i.e. the amount of tax, was the same, and, therefore, the case should be treated similarly.

In addition to Milliken, the Court of Appeals indicated that a separate

basis for the result it reached was found in Darusmont. While recognizing that Darusmont distinguished Untermeyer on the ground that Untermeyer was a gift tax case and Darusmont was an income tax case, the Court of Appeals said that the Supreme Court acknowledged the constitutionality of retroactivity involved reliance on existing law and foreseeability of change. Moreover, since the change which was to become the 1978 version of 2035(b)(2) was a matter of Congressional discussion prior to Jane Ceppi's gifts, the Court of Appeals held that the requirements of notice had been satisfied and due process observed.

Existence of Jurisdiction Below

The United States Court of Appeals for the First Circuit had jurisdiction over this matter under 26 U.S.C. 7482.

Reason for Granting Writ

This matter should be reviewed for two compelling reasons. First, the Court of Appeals clearly misconstrued the existing law. Second, numerous cases have questioned the meaning and present vitality of Untermeyer. In fact, the Court of Appeals limited the scope of Untermeyer. However, this Court has never overruled Untermeyer or limited its holding. Therefore, a review would be in order to clarify Untermeyer and determine its state of health.

1. The Court of Appeals misconstrued Untermeyer and Milliken. In Untermeyer a gift had been made in 1924 while a bill that would tax it was pending before Congress. The statute, enacted a few days later in 1924, created a new tax on inter vivos gifts and applied retroactively. The Court held that retroactive application of the novel tax violated due process.

In Milliken the donor made gifts of corporate stock in December 1916, at which time an estate tax on gifts in contemplation of death was already in effect. In 1918 Congress increased the estate tax rate on such gifts and applied such rate to gifts made prior to its enactment. The donor died in 1920. The Court held that retroactive application was constitutional. The Court held that in Untermeyer,

the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax

Milliken, 283 U.S. at 21. The foreseeability of the tax in Milliken was different:

Not only was the decedent left in no uncertainty that the gift he was then making was subject to the provisions of the existing statute, but in view of its well understood purpose he should be regarded as taking his chances

of any increase in the tax burden which might result from carrying out the well established policy of taxation under which substitutes for testamentary gifts were classed and taxed with them. 283 U.S. at 23.

The Court of Appeals reasoned that Milliken should control the matter sub judice because the Revenue Act of 1978 does not encompass a wholly new gift tax, that the gifts in question were includable in the gross estate, and that an increase in the estate tax base is analagous to the increase in the estate tax rate in Milliken. An increase in the base has the same effect as an increase in the rate viz. increased taxes.

The petitioner contends that this analysis by the Court of Appeals is wrong. First, while the Revenue Act of 1978 does not embody a new type of tax, it does retroactively apply a tax to property not formerly subject to the tax. In substance this is as novel as the situation in Untermeyer. In Untermeyer there was no tax at all on gifts made in contemplation of death at the time of the gift. In the instant matter there was a tax but it did not apply at all to certain property. The two situations are indistinguishable from a constitutional perspective

since both subject the taxpayer to frustration of his expectations and in a manner that could not have been foreseen. Both are distinguishable from mere increases in the rate of taxation which the Court has consistently upheld. In fact, unforeseeable retroactive application has been held unconstitutional where a subsequently enacted law, while not imposing an entirely new form of tax, nonetheless extends an existing tax to transactions or property not subject to it at the time of the transaction. Helvering v. Hemholz, 296 U.S. 93 (1935); Barritt v. Tomlinson, 129 F. Supp. 642 (S.D. Fla. 1955).

In the case of Helvering v. Helmholtz, a donor made an irrevocable transfer to a trust retaining very limited powers over the trust. The Service contended that under the estate tax laws as worded at the time of her death, these powers made the original transfer incomplete and effective only upon her death, and thus includable in her estate. The Supreme Court held that even if the Service's interpretation was correct, retroactive application of the later law would be unconstitutional, citing Nichols v. Coolidge 274 U.S. 531 (1927). Accord, White v. Poor, 296 U.S. 98 (1935) (companion case to Helvering v. Helmholtz). In Barritt v. Tomlinson, a husband left his wife a power of appointment over certain property upon his death in 1944. Following the audit of the estate of the wife, who died in 1949, the Service claimed that the power was a general power of appointment.

under the Powers of Appointment Act of 1951, which purported to apply to all estates of decedents dying after 1942. The property subject to the power was clearly excludable from the wife's estate under the law in effect at the time of her husband's death (as well as her own). The District Court held that the 1951 Act could not constitutionally be applied retroactively to the subject property, since its inclusion in the wife's estate was not at all foreseeable when the creation of the power became final at the time of the husband's death (nor at the death of the wife).

Second, the Court of Appeals analogy between the increase in the estate tax rate in Milliken with the increase in the estate tax base in the instant matter begs the question. Of course, they are analagous in that the result is the same in the form of increased taxes. However, the very issue concerns the circumstances under which the base can be increased without violating due process. Clearly, if the gift in Untermeyer were includable in the estate, it would be increasing the base. Following the reasoning of the Court of Appeals, it would seem logical that the tax was constitutional because increasing the base is analogous to increasing the rate. It is analogous in that the tax increases, but the question is under what circumstances may the base be increased without violating constitutional standards.

Whether the retroactive application of a novel tax or the retroactive application of an existing tax to property previously exempt is constitutional devolves upon the adequacy of notice.

Whether or not a taxpayer had reason to anticipate the subjection of his transaction to an unenacted tax law depends, of course, on the facts of each individual case; there is no generally applicable time span of constitutional retroactivity extending backward from the date of enactment. Supreme Court precedent indicates, however, that in the case of new estate or gift tax laws rendering taxable a previously tax-free transfer, the date of final House-Senate Conference Committee agreement on the new law is regarded as the constitutional limit of retroactive application. In Untermeyer v. Anderson, the gifts were made after passage of the gift tax legislation by both Houses of Congress but before the approval of the final version by the House-Senate Conference Committee. More recently, Congress itself seems to have acknowledged the limit of retroactivity fixed by Untermeyer in connection with the Tax Reform Act of 1976, P.L. 94-455 signed into law on October 4, 1976. Congress made the unified credit reduction for lifetime gifts, Code 2010 (c), retroactive only to September 8, 1976, apparently the date of the actual Conference Committee vote approving the provision. (The Committee report itself was filed on September 13, 1976). 1976 U.S.

Code Cong. & Ad. News 2897, 7150. Turning to the present case, the Revenue Act of 1978 was not passed by the Senate until October 10, 1978, and the Conference Committee Report, House Report 95-1800, was filed on October 15 (well after the gifts made by Mrs. Ceppi the preceding January). 1978 U.S. Code Cong. & Ad. News 7198, 10,004. These gifts were thus beyond the limit of retroactivity for the 1978 legislation.

The fact that the changes in §2035 (b)(2) ultimately enacted in 1978 were initially introduced into Congress in the spring of 1977 as part of the Technical Corrections Act of 1977 and were pending in Congress for the remainder of the session does not require any change in the foregoing result. Untermeyer, supra, is very clear to the effect that the mere pendency of legislation in Congress is not ordinarily sufficient to require a taxpayer to expect ultimately to have his current transactions subjected to that legislation:

To accept a contrary view would produce insuperable difficulties touching interpretation and practical application of the statute and render impossible proper understanding of the burden intended to be imposed. The taxpayer may justly demand to know when and how he becomes liable for taxes - he cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before

Congress is necessarily uncertain.
Id. at 445-466.

2. The decision of the Court of Appeals derives from a very narrow reading of Untermeyer. The decision turns on a construction of Untermeyer that limits its applicability to a wholly new gift tax. The Court of Appeals cites numerous lower court cases that have questioned or limited Untermeyer in the light of Milliken:

Westwick v. Commissioner of Internal Revenue, 636 F.2d 291, 292 (10th Cir. 1980) (limiting Untermeyer to "wholly new types of taxes"); Buttke v. Commissioner of Internal Revenue, 625 F.2d 202, 203 (8th Cir. 1980), cert. denied, 450 U.S. 982 (1981) (reads Untermeyer to hold that "retroactive application of wholly new tax invalid"); Shanahan v. United States, 447 F.2d 1082, 1083 (10th Cir. 1971) ("the force of Untermeyer has been vitiated by Milliken v. United States . . .") (dictum); Sidney v. Commissioner of Internal Revenue, 273 F.2d 928, 932 (2d Cir. 1960) ("If Untermeyer remains authority at all, it is so only for the particular situation of a wholly new type of tax there under consideration"); First National Bank in Dallas v. United States, 420 F.2d 725, 730 n.8 (Ct. of Claims), cert. denied, 398 U.S. 950 (1970) ("it is not entirely clear, in light of the above and the ever-increasing role of taxation in every area of activity, that the same result would obtain in these early cases [Untermeyer and others] were they before the Court today"); Rose v. Commissioner of

Internal Revenue, 55 T.C. 28, 30 (1970)
("The force of the Untermeyer decision
has been vitiated by a later estate tax
case [Milliken].")

However, the petitioner contends that the holding in Untermeyer should not be so limited. The petitioner submits that Untermeyer remains authority where the tax in question is not wholly new but rather existed at the time of the transaction sought to be taxed but did not then apply to that transaction. Barritt v. Tomlinson, 129 F. Supp. 642 (1955), expressly followed Untermeyer, and Helvering v. Helmholz, 296 U.S. 93 (1935), followed its result, although citing Nichols v. Coolidge, 274 U.S. 531 (1927). Both cases involved the imposition of an estate tax on property transferred at a time when there was an estate tax in effect but not applicable to the property at the time of the transfer. The Supreme Court has also cited Untermeyer with approval in post-Milliken cases such as Welch v. Henry, 305 U.S. 134 (1938), although not following it because of a distinguishable factual situation. Milliken, itself, did not criticize or question Untermeyer. Rather, it simply distinguished Untermeyer on the ground that the taxpayer in Untermeyer had no reason at all to foresee the imposition of the tax on his transfer, while the Milliken taxpayer did have such reason because the retroactive change there was simply an increase in the rate of a tax which was applicable to the transferred property at the time of the gift. Id. at 21, 23.

This recent concern about Untermeyer stems from its frequent and inappropriate citation by taxpayers as authority for

the proposition either that all retro-active taxation is unconstitutional or that short periods of retroactive application of income tax statutes were unconstitutional. For example, it was cited by the taxpayer in Sidney, supra, even though the statute there not only was an income tax rather than a transfer tax statute, but also merely raised the tax rate rather than subjecting the transaction to taxation for the first time. Id. at 932. Rose and Shanahan, supra, also involved income tax statutes. Untermeyer has never been questioned in any case with comparable facts, and it or its result has indeed been followed in the comparatively few cases with similar facts.

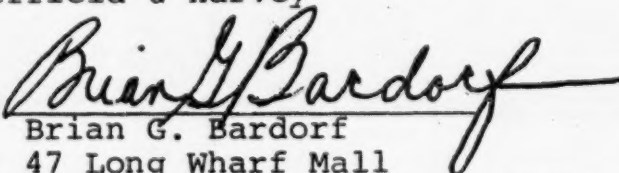
Conclusion

For the above cited reasons it is respectfully urged that this Honorable Court grant the petition.

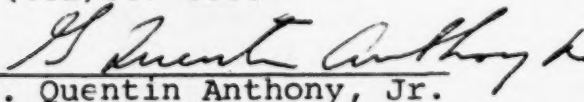
Respectfully Submitted,

Sheffield & Harvey

By:

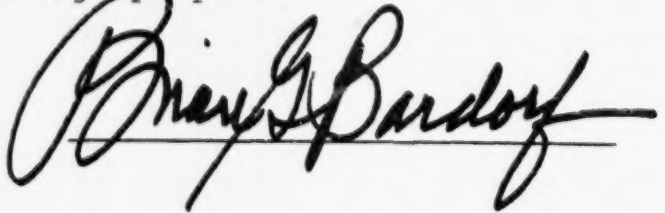

Brian G. Bardorf
47 Long Wharf Mall
Newport, Rhode Island 02840
(401) 847-6000

By:


G. Quentin Anthony, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 1983, I delivered a true copy of the within Petition for Writ of Certiorari and Appendix to the Solicitor General, Department of Justice, Washington, D.C. 20530; the Commissioner of Internal Revenue, 1111 Constitution Avenue, N.W., Washington, D.C., 20224; and Elaine Ferris, Glenn L. Archer, Jr., Robert T. Duffey, Michael L. Paup, Tax Division, Department of Justice, Washington, D.C., 20530, Counsel for the respondent, and Nathaniel Brayton, Hutchins and Wheeler, One Boston, Place, Boston, Massachusetts, 02108, Counsel for Respondent, by air mail, postage prepaid.

A handwritten signature in cursive script, reading "Brian G. Bardoff", written over a horizontal line.

APPENDIX

No. 82-1453

BAILEY BROWN, Senior Circuit Judge.

In this estate tax case, the decedent shortly before death, made gifts each in excess of \$3000 to eight individuals. It is without dispute that the gifts ~~are generally includable in the decedent's gross estate.~~ The issue is whether \$3000 of each gift is to be excluded from the gross estate. The estate tax statute contains an exclusion provision applicable to gifts that are to be included in the gross estate, and this exclusion provision is tied to the \$3000 annual exclusion provided by the gift tax. The estate contends that \$3000 of each gift must be excluded, and this contention is referred to as the "subtraction out" theory. The Internal Revenue Service (IRS) contends that no part of the gifts can be excluded because each donee received more than \$3000 from the donor-decedent in that year, and this contention is referred to as the "de minimis" theory.

The Tax Court, 78 T.C. 320, held that no part of the gifts may be excluded from the gross estate. We affirm but on a different basis than that of the Tax Court.

I

On January 5, 1978, the decedent, Jane B. Ceppi, made eight gifts to eight different relatives. Each gift consisted of 75 shares of Dome Mines and 20 shares of Texas Instrument stock. The value of each gift was

No. 82-1453

\$6,477.75 on the date the gift was made and \$6,585.00 on the date of death. Ten days later, on January 15, 1978, Mrs. Ceppi died. The taxpayer does not dispute that these gifts are generally includable in the estate for estate tax purposes under §2035(a).^{1/}

However, when the executor of the estate filed the federal estate tax return in October 1978, he claimed that \$3000 of each gift was excludable under §2035(b)(2). The estate's "subtraction out" interpretation of the 1976 version of §2035(b)(2) is that it allows exclusion of the first \$3000 of any gift in excess of \$3000. The IRS disallowed the exclusion on the basis of its "de minimis" interpretation of §2035(b)(2), under which no portion of gifts to a donee, which in a calendar year exceed a total of \$3000, is excludable.

Later that same year, on November 6, 1978, the President approved the 1978 version of §2035(b)(2), which clearly adopts the de minimis theory. Moreover, Congress provided that the 1978 version applies retroactively to all gifts made on or after January 1, 1977. Congress subsequently enacted the Technical Corrections Act of 1979, Pub. L. No. 96-222, 94 Stat. 194, (1980) which allows election of the subtraction out method for gifts made in

1/

Unless otherwise indicated, all section numbers refer to the Internal Revenue Code, 26 U.S.C.

1977. Id. §107(a)(2)(F). But it left intact the retroactive application of the 1978 de minimis theory to the gifts presently in issue, made on January 5, 1978.

After the deficiency of \$7,296 was determined, the taxpayer filed a petition in the Tax Court to redetermine the deficiency. The taxpayer asserted two basic contentions. First, the 1976 version of §2035(b)(2) adopted the subtraction out theory. Second, the retroactive application of 1978 version, which without dispute requires application of the de minimis theory, violates the Due Process Clause of the Fifth Amendment. The Tax Court held that the 1976 version adopted the de minimis theory, and thus it did not address the constitutional issue. On appeal, the taxpayer presents both arguments, and it must succeed on both in order to prevail.

II

Section 2035(a) of the Internal Revenue Code provides generally that the value of gifts made within three years of death is includable in the estate for estate tax purposes. Subsection (b) enumerates the following exception to this general rule of inclusion:

any gift excludable in computing taxable gifts by reason of section 2503(b) (relating to \$3,000 annual exclusion for purposes of the gift tax) determined without regard to section 2513(a).

§2035(b)(2).

The IRS contends that the term "any gift" contemplates the de minimis theory that no portion of total gifts to a donee in excess of \$3000 in a calendar year is excludable. This is an all or nothing approach; the gifts are either less than \$3000 and entirely excludable, or greater than \$3000 and nothing is excludable. According to the IRS, "any gift" means the total of the gifts made to a donee in a calendar year. In this connection, the IRS contends that to give §2035(b)(2) the effect sought by the taxpayer, it is necessary to read "any gift" to provide "any part of any gift". The IRS calls this the "de minimis" theory because, if applied, it would allow executors not to be concerned with gifts in small amounts made shortly before death and would at the same time be administratively convenient to the IRS.

This view of the statutory language is unpersuasive. The term "any gift" does not necessarily require the IRS's all or nothing approach. More importantly, the 1976 version of §2035(b)(2) specifically incorporates §2035(b) which adopts the subtraction out

theory of the gift tax.^{2/} Section 2035(b)(2)'s incorporation of §2503(b) strongly suggests that it also incorporates §2503(b)'s subtraction out theory. Thus it appears that statutory language supports the taxpayer.

Contemporaneous legislative history bolsters this conclusion. In a report prepared by the staff of the Joint Committee on Taxation shortly after enactment of the 1976 version, the subtraction out interpretation of §2035(b)(2) was adopted. General Explanation of the Tax Reform Act of 1976, reprinted in 2 1976-3 C.B., 541. The IRS attempts to undercut this report by pointing out that it was prepared after enactment of the statute and the committee apparently did not formally adopt the report. But the government concedes that the report "is an extremely valuable contribution to the legislative history."

2/ Section 2503(b) states:

EXCLUSION FROM GIFTS-- In computing taxable gifts for the calendar quarter, in the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1971 and subsequent calendar years, \$3,000 of such gifts to such person less the aggregate of the amounts of such gifts to such person during all preceding calendar quarters of the calendar year shall not, for purposes of subsection(a), be included in the total amount of gifts made during such quarter.

The IRS, though, relies on subsequent legislative history. In the course of enacting the 1978 version and the Technical Corrections Act of 1979, Congress took the view that the 1976 version adopted the de minimis theory. For instance, during consideration of the Technical Corrections Act, the Senate Finance Committee stated:

^{3/} It is noteworthy that commentators have virtually universally adopted, either explicitly or implicitly, the subtraction out theory. See e.g., D. Link & L. Soderquist, Law of Federal Estate and Gift Taxation, Code Commentary, "Commentary" §2035 (b): 1 (1978); S. Surrey, W. Warren, P. McDaniel & H. Gutmann Federal Wealth Transfer Taxation, Cases and Materials 257-258 (1977); Donaldson, Inter Vivos Giving in Estate Planning Under the Tax Reform Act of 1976, 18 Wm. & Mary L. Rev. 539, 543-544 (1977); Hodges, Current Strategies for Using Lifetime Gifts to Reduce Total Estate and Gift Taxes, 47 J. Tax'n 266, 267 n. 3 (1977); Ingram, The Estate, Gift, Generation Skipping, and Related Income Tax Provisions of the Tax Reform Act of 1976 and Some Estate Planning Observations, 1976 Utah L. Rev. 647, 746-747; Resnic, Estate Planning Under the 1976 Tax Reform Act, 62 Mass. L.Q. 89, 92 (1977); Zaritsky, The Estate and Gift Tax Revisions of the Tax Reform Act of 1976, 34 Wash. & Lee L. Rev. 353, 360 (1977); Note, Section 2035: Taxation of Gifts Made Within Three Years of Death, 19 B.C.L. Rev. 577, 589-590 (1978).

The legislative history [to the 1976 Act] was somewhat ambiguous and could be read to mean that this exception resulted in the inclusion of only the excess of the estate value of all gifts over the amount excludible under the gift tax annual exclusion.

* * * * *

Because of the ambiguity that existed prior to the committee's action on this issue in October 1977, [4] it is possible that gifts could have been made in excess of \$3,000 based upon the assumption that only the excess of the value over \$3,000 would be included in the gross estate as transfers within 3 years of death. Therefore, the committee believes that the "subtraction out" concept should be allowed with respect to gifts made before the adoption of the clarifying change by the Ways and Means Committee.

S. Rep. No. 498, 96th Cong., 2d Sess., 86-87, reprinted in in 1980 U.S. Code

4/

In October 1977, the House Ways and Means Committee approved the proposed Technical Corrections Act of 1977, which would have adopted the de minimis approach. This proposal was eventually incorporated in the 1978 Revenue Act.

Cong. & Ad. News 316, 395. Other language indicates that the amendment was a "clarification" of the 1976 version.

Although some cases suggest that statements by a subsequent Congress are very valuable in statutory interpretation, the bulk of the case law indicates that such statements are dubious. The Supreme Court recently summarized the proper use of such statements:

This Court has observed that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313 (1960). This sound admonition has guided several of our recent decisions. See, e.g., TVA v. Hill, 437 U.S. 153, 189-193 (1978); SEC v. Sloan, 436 U.S. 103, 119-122 (1978). Yet we cannot fail to note Mr. Chief Justice Marshall's dictum that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." United States v. Fisher, 2 Cranch 358, 386 (1805). In consequence, while arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent. See, e.g., Seatrains Shipping Corp. v. Shell Oil Co., 444 U.S. 572, 596; Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-381 (1969); NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-275 (1974).

Andrus v. Shell Oil Co., 446 U.S. 657, 666, n. 8 (1980). See also Annot., 56 L. Ed.2d 918, 919 (1979) (subsequent legislative history is not dispositive). In the present context where the statutory language and contemporaneous legislative history indicate an intent to adopt the subtraction out theory, subsequent statements by Congress should carry relatively little weight.

We therefore conclude that the taxpayer is correct that the 1976 version of the statute allows the exclusion of the first \$3000 of gifts in excess of that amount to a donee in a calendar year. This, however, is not the end of the matter. We now turn to the question of the applicability of the 1978 version of the statute.

III

The IRS alternatively relies on the 1978 version of §2035(b)(2), which by its terms is made retroactive and clearly adopts the de minimis theory.^{5/}

^{5/} The 1978 version provides an exclusion:

to any gift to a donee made during a calendar year if the decedent was not required by section 6019 to file any gift tax return for such year with respect to gifts to such donee.

By providing that the exclusion turns on whether the decedent is required to file a gift tax return, the 1978 version allows no exclusion once the gifts to a donee exceed \$3000.

The taxpayer, however contends that retroactive application violates due process.

Each party cites numerous cases supporting its respective position. But the issue turns on the relationship between three cases, United States v. Darusmont, 449, U.S. 292 (1981) (per curiam); Milliken v. United States, 283 U.S. 15 (1931); and Untermeyer v. Anderson, 276 U.S. 440 (1928).

In Untermeyer, a gift had been made in 1924 while a bill that would tax it was pending before Congress. The statute, enacted a few days later in 1924, created a new tax on inter vivos gifts and applied retroactively. The Court held that retroactive application of this novel inter vivos gift tax violated due process.

In Milliken, the donor made gifts of corporate stock in December 1916, at which time an estate tax on gifts in contemplation of death was already in effect. In 1918 Congress increased the estate tax rate on such gifts and applied such rate to gifts made prior to its enactment. The donor died in 1920. Inclusion of the gifts in the taxable estate was not challenged; the sole issue was whether the higher rates could properly be applied. The Court held that retroactive application was constitutional.

The Milliken Court distinguished Untermeyer on the ground of foreseeability of the tax. In Untermeyer,

the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax.

Milliken, 283, U.S. at 21. The foreseeability of the tax in Milliken was quite different:

Not only was the decedent left in no uncertainty that the gift he was then making was subject to the provisions of the existing statute, but in view of its well understood purpose he should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation under which substitutes for testamentary gifts were classed and taxed with them.

283 U.S. at 23. Generally, the Milliken Court held that the constitutionality of retroactivity involved there depended on the nature of the particular tax and upon the gift involved. Id. at 21-22.

But Milliken's attempt to distinguish Untermeyer is not completely convincing, and numerous lower courts have narrowly interpreted or questioned Untermeyer in of the Milliken decision. Westwick v. Commissioner of Internal Revenue, 636 F.2d 291, 292 (10th Cir. 1980) (limiting Untermeyer to "wholly new types of taxes"). Buttke v. Commissioner of Internal Revenue 625 F.2d 202, 203 (8th Cir. 1980), cert. denied, 450 U.S. 982 (1981) (reads Untermeyer to hold that "retroactive

application of wholly new tax invalid"); Shanahan v. United States, 447 F.2d 1082, 1083 (10th Cir. 1971) ("the force of Untermeyer has been vitiated by Milliken v. United States, . . .") (dictum); Sidney v. Commissioner of Internal Revenue, 273 F.2d 928, 932 (2d Cir. 1960) ("If Untermeyer remains authority at all, it is so only for the particular situation of a wholly new type of tax there under consideration:"); First National Bank of Dallas v. United States, 420 F.2d 725, 730 n. 8 (Ct. of Claims), cert. denied, 398 U.S. 950 (1970) ("it is not entirely clear, in light of the above and the ever-increasing role of taxation in every area of activity, that the same result would obtain in these early cases [Untermeyer and others] were they before the Court today"); Rose v. Commissioner of Internal Revenue, 55 T.C. 28, 30 (1970) ("The force of the Untermeyer decision has been vitiated by a later estate tax case [Milliken].") These cases indicate that Milliken significantly limits Untermeyer. As Judge Friendly concluded in Sidney v. Commissioner of Internal Revenue, *supra*, Untermeyer at best remains good law only for the proposition that a wholly new gift tax cannot be applied retroactively.

Under this reading of Untermeyer and Milliken, the retroactive application of the 1978 version of §2035(b) (2) is constitutional. In both Milliken and the present case, there was no dispute that the gifts were includable in the gross estate. Moreover, the increase in the estate tax base in this case is closely analogous to the increase

in the estate tax rate in Milliken. The practical concern of the donor is the amount of taxes due, and an increase in the tax base has the identical effect as an increase in the tax rate -- it increases the amount of taxes due. Thus, the present case falls squarely within Milliken.

In Darusmont, the taxpayer entered into a transaction (a sale of property) in 1976 which, at the time it was made, was not subject to the minimum income tax provisions. But later in 1976 Congress amended these provisions and provided for retroactive application, subjecting the transaction to the minimum income tax. In holding the retroactive application valid, the Court distinguished Untermeyer on the ground that it is a gift tax case and the gift was made and completely vested "before the enactment of the taxing statute." 449 U.S. at 299. In Darusmont, the Court assumed, arguendo, that reliance on existing law and foreseeability of change is relevant to the issue of the constitutionality of retroactive application. In answer, the Court pointed out that the involved change in the law was a matter of public discussion and had been under consideration by Congress prior to the taxpayer's transaction. Id. Here the adoption of the *de minimis* theory that was enacted in November, 1978 had been under consideration and approved by the House Ways and

Means Committee in October, 1977.^{6/}

IV

We therefore conclude that, although the Tax Court was in error in concluding that the 1976 version of §2035(b)(2) adopted the de minimis theory rather than the subtraction out theory, the Tax Court reached the correct result because the retroactive application of the 1978 version is constitutional. As modified, the Tax Court is AFFIRMED.

^{6/} See H.R. 6715, 95th Cong., 1st Sess. §3(f); H.R. Rep. No. 700, 95 Cong., 1st Sess. at 73-74 (1977).

78 T. C. No. 23

UNITED STATES TAX COURT

ESTATE OF JANE B. CEPPI, Deceased,
PETER B. CEPPI, Executor,
Petitioner, v. COMMISSIONER OF IN-
TERNAL REVENUE, Respondent

Docket No. 6843-80 Filed March 2, 1982

Petitioner's decedent made several gifts, each exceeding \$3,000 in value, in January, 1978. The value of such gifts was included in the decedent's estate under Sec. 2035(a), I.R.C., 1954. Held, petitioner is not entitled to exclude \$3,000 for each gift under Sec. 2035(b)(2), I.R.C., 1954.

G. Quentin Anthony, Jr., for Petitioner

Pamela V. Gibson, for Respondent

OPINION

TANNENWALD, Chief Judge: Respondent determined a deficiency in petitioner's Federal estate tax of \$7,296.00. After concessions, the sole issue to be decided is whether petitioner may deduct \$3,000 from the date-of-death value of each of eight gifts made by Jane B. Ceppi, now deceased, on January 5, 1978, 10 days before her death.

This case was submitted fully stipulated pursuant to Rule 122.¹ The stipulation of facts is incorporated by this reference.

Petitioner is the Estate of Jane B. Ceppi, represented by its executor, Peter B. Ceppi. At the time he filed the petition in this case, Peter B. Ceppi resided in Jamestown, Rhode Island. Jane B. Ceppi died on January 15, 1978, in Jamestown, Rhode Island. Ten days previously, she made eight gifts to eight different relatives. Each gift consisted of 75 shares of Dome Mines stock and 20 shares of Texas Instruments, and each gift had a value of \$6,477.75 on January 5, 1978, and a value of \$6,585.00 on January 15, 1978.

¹ All rule references are to the Tax Court Rules of Practice and Procedure. All section references, unless otherwise indicated, are to the Internal Revenue Code of 1954, as amended, and in effect at the time of decedent's death.

The parties agree that the value of the stock transferred by the decedent 10 days prior to her death is properly includable in her gross estate, and the only disagreement turns on whether \$3,000 per donee is exempted from that value. This question, the parties agree, turns solely on the proper interpretation of Section 2035(b)(2), as amended by the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, The Revenue Act of 1978, Pub. L. 95-600, 92 Stat. 2763, and the Technical Corrections Act of 1979, Pub. L. 96-222, 94 Stat. 194 (1980).

Section 2035(a) causes inclusion in a decedent's gross estate of the value of all property transferred by the decedent "during the 3-year period ending on the date of the decedent's death." As amended by the Tax Reform Act of 1976, Section 2035(b)(2) (hereinafter the "old law") negated the inclusion rule of Section 2035(a) with respect to --

any gift excludable in computing taxable gifts by reason of Section 2503(b) (relating to \$3,000 annual exclusion for purposes of the gift tax) * * *²

² Section 2503(b) reads in pertinent part:

In computing taxable gifts for the calendar quarter, * * * \$3,000 of such gifts to [any] person less the aggregate of the amounts of such gifts to such person during all preceding calendar quarters of the calendar year shall not * * * be in-

As modified by the Revenue Act of 1978 (hereinafter the "new law"), however, this subsection applied --

to any gift to a donee made during a calendar year if the decedent was not quired by Section 6019 to file any gift tax return for such year with respect to such donee.

The scope of the new law is clear: the value of all gifts made within three years of the transferor's death is includable in the transferor's gross estate, except for those gifts made to a single donee which do not aggregate more than \$3,000 in any calendar year. See Sections 2035(a), 2035(b)(2), 2503(a), and 6019(a).⁴ The scope of the old law, however, is less clear as to whether it created a per donee annual exclusion of

cluded in the total amount of gifts made during such quarter.

Thus, it establishes a per donee annual exclusion of \$3,000.

3 The reach of Section 2035 has been sharply curtailed with respect to decedents dying after December 31, 1981. See Section 424, Economic Recovery Tax Act of 1981, Pub. L. 97-34, 95 Stat. 317.

4 Section 6019(a) reads in pertinent part:

(the "subtraction out" interpretation or simply embodied, like the new law, an exception for gifts to a given donee totaling less than \$3,000 (the "de minimis" interpretation). There is no question that Congress sought to supplant the ambiguity of the old law with the clarity of the new⁵, and, in keeping with that objective, provided that, with respect to estates of decedents dying after December 31, 1976, the new law should have retroactive application back to January 1, 1977, see Section 702(f)(2), Revenue Act of 1978, supra. As a result, because the (prospective) effective date of the Tax Reform Act of 1976 was also January 1, 1977, the old law is mooted if retroactive application of the Revenue Act of 1978 is given effect. Congress recognized that the retroactive application of the new law could work an injustice upon those who made gifts "in ex-

Any individual who in any calendar quarter makes any transfers by gift (other than transfers which under Section 2503 (b) are not to be included in the total amounts of gifts for such quarter * * *) shall make a return for such quarter with respect to the gift tax * * *.

5 The new law is declared to be a "[c]larification" of the old law. See Section 702(f)(1), Revenue Act of 1978, Pub. L. 95-600, 92 Stat. 2930. The legislative history of the old law casts no significant light on whether the "subtraction out" or "de minimis" interpretation was intended. The Committee

cess of \$3,000 based upon the assumption that only the excess of the value over \$3,000 would be included in the gross estate,"⁶ H. Rept. 96-250, 66 (1979) S.

on Ways and Means did not specifically address this issue, see H. Rept. 94-1380, 12-14 (1976), reprinted in 1976-3 C.B. (Vol. 3) 735, 746-748, the Senate forerunner to the Tax Reform Act of 1976 did not address this issue, and the Conference Committee did no more than describe the amended Section 2035 as "provid[ing] for the inclusion in the decedent's gross estate for all gifts (in excess of the \$3,000 annual exclusion) made within the 3-year period prior to the decedent's death," see S. Rept. 94-1236, 608 (1976), reprinted in 1976-3 C.B. (Vol. 3) 807, 958. Congress subsequently referred to this legislative history as "ambiguous." H. Rept. 96-250, 65-66 (1979); S. Rept. 96-498, 86-87 (1979).

6 The prevailing view after the enactment of the old law and before the enactment of the new law suggested that the old law embodied the "subtraction out" interpretation. See General Explanation of the Tax Reform Act of 1976 (Staff of the Joint Committee on Taxation) 529, reprinted in 1976-3 C.B. (Vol. 2) 1, 541; S. Surrey, W. Warren, P. McDaniel, & H. Gutman, Federal Wealth Transfer Taxation 257 (1977); Zaritsky, "The Estate and Gift Tax Revisions of the Tax Reform Act of 1976," 34 Wash. & Lee L. Rev. 353, 360 (1977); Ingram, "The Estate, Gift, Generation-Skipping, and Related Income Tax Provisions of

Rept. 96-498, 87 (1979), and so, in the Technical Corrections Act of 1979, supra, Sec. 107(a)(2)(F), Congress provided that executors could elect the "subtraction out" interpretation in lieu of the "de minimis" interpretation mandated by the Revenue Act of 1978. This election was only permitted with respect to gifts made in 1977, and, thus, by its terms, was not available with respect to gifts made between January 1, 1978 and November 6, 1978.⁷

the Tax Reform Act of 1976 and Some Estate Planning Observations," 1976 Utah L. Rev. 647, 746-747; Note, "Section 2035: Taxation of Gifts Made Within Three Years of Death," 19 B.C. L. Rev. 577, 589 (1978) (by implication).

7 The legislative history of the Technical Corrections Act of 1979 explains Congress' failure to extend the election to all gifts made before the new law was passed, as justified by action taken by the House of Representatives Committee on Ways and Means in October, 1977. See H. Rept. 96-250, supra, at 66; S. Rept. 96-498, supra at 87. That action, H. Rept. 95-700, 73-74 (1977), was a forerunner to the new law as contained in the Revenue Act of 1978. It indicated the belief of the Committee on Ways and Means that the old law should be rephrased unequivocally to incorporate the "de minimis" theory, and, of course, that is what was done one year later. The actual bill under consideration when H. Rept. 95-700, supra, was drafted, however (Technical Corrections Act of 1977, H.R. 6715, 95th Cong., 1st Sess.), was not enacted, nor was anything similar passed during that session of Congress.

The chronology of the facts of this case places petitioner in the class of persons not entitled to the benefits of the election provided by the Technical Corrections Act of 1979. Petitioner argues that the law in effect when the gifts were made and when the decedent died (the old law) provided a "subtraction out" exemption of \$3000 per donee and that the new law constitutes a retroactive abolition of this exemption which violates the due process clause of the Fifth Amendment. Respondent on the other hand, argues that the old law adopted the "de minimis" concept and that, even if it did not, there is no constitutional infirmity in the retroactive application of the new law. We travel the path to decision conscious of the admonition that Federal statutes should be interpreted to avoid constitutional questions. Califano v. Yamasaki, 442 U.S. 682, 692-693 (1979); Lucas v. Alexander, 279 U.S. 573, 579 (1929).

That, at the time of its enactment, the old law was susceptible of two interpretations cannot seriously be disputed. Its \$3000 exemption was tied to section 2503(b), which provided for a \$3000 per donee annual exclusion applicable to all gifts to a given donee whether or not their total exceeded \$3000. Thus, the cross-reference in the old law to section 2503(b) supports petitioner's "subtraction out" interpretation. On the other hand, respondent's "de minimis" interpretation is supported by the old law's applicability being limited to "any gift" excludable in computing taxable gifts by reason of section 2503(b)" (emphasis added), for if Congress had intended to enact pe-

itioner's "subtraction out" theory, it would have been better served by a statute which applied to that part of any gift or gifts excludable by reason of section 2503(b).

As we have indicated, see n. 5 supra, the legislative history of the old law fails to suggest whether Congress intended to enact a "subtraction out" or a "de minimis" provision. Respondent has not clarified the ambiguity by regulation, and our ability to properly interpret the old law is not helped by the content of the two possibilities, for neither approach is clearly superior to the other. Compare Cremer, "The 1981 Act and Section 2035: Problems and Possibilities," 35 Tax Lawyer 389, 396-398 (1982) (irrationality of the "de minimis" approach) with H. Rept. 95-7000 (see n. 7, supra), at 73-74 (unfair administrative burdens imposed on executors by "subtraction out" approach). The only clear fixture on this bare terrain is the statement by the subsequent Congress in the new law that it was "clarifying" the exemption of section 2035(b)(2) to reflect its prior intent. See n. 5, supra.

We recognize that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," United States v. Price, 361 U.S. 304, 313 (1960). But such views "should not be rejected out of hand as a source which a court may consider in the search for legislative intent," Andrus v. Shell Oil Co., 446 U.S. 657, 666 n. 8 (1980).

[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, Teamsters v. United States, 431 U.S. 324, 354, n. 39 (1977), such views are entitled to significant weight, NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974), and particularly so when the precise intent of the enacting Congress is obscure. [Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980)].

We are faced in the case at bar with the task of interpreting an ambiguous statute whose meaning simply cannot be discovered by resort to the usual tools. In such circumstances, legislative assistance is entitled to great weight. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-381 (1969). This is particularly true when the legislature explicitly characterizes its action as a clarification. See Greensboro Gas Co. v. Commissioner, 30 B.T.A. 1362, 1374-1375 (1934), *affd.* 79 F.2d 701 (3d Cir. 1935). Indeed, not only is the new law called a clarification of the old law, see note 5, *supra*, but it was passed in Title VII of the Revenue Act of 1978, which was labeled "Technical Corrections of the Tax Reform Act of 1976."

This is not a case where Congress has tried by legislative fiat to change an ambiguous law under the guise of clarification. Cf. United Telecommunications, Inc. v. Commissioner, 65 T.C. 278, 287 (1975), 67 T.C. 760 (1977), *affd.* 589 F.2d 1383 (10th Cir. 1978). We have an instance "[w]here the original law was subject to very serious doubt," and so, "by permitting subsequent amendments to control the former meaning [,]

a great deal of uncertainty in the law is removed. And the legislature is probably in the best position to ascertain the most desirable construction." 2A J. Sutherland, Statutes and Statutory Construction, sec. 49.11 at 265 (Sands 4th ed. 1973). Such an approach is particularly apt where the legislative clarification came on the heels of the passage of the ambiguous statute. Compare Greensboro Gas Co. v. Commissioner, supra.

Under the circumstances herein, as between the two reasonable interpretations of the old law, we think it appropriate to accept the legislative clarification. Moreover, our interpretation of the old act voids the constitutional question⁸ (see p. 7 supra)

⁸ We recognize that no constitutional question is directly involved, whichever interpretation of the old law is adopted, and that what is involved is interpreting the old law so as to avoid a constitutional question in respect of the new law. It seems clear, however, that the admonition of construing a statute to avoid a constitutional question, see p. 7, supra, extends to such a situation.

which petitioner's "subtraction out" interpretation would raise, namely, whether the new law retroactively and unconstitutionally imposed a tax within the ambit of Untermeyer v. Anderson, 276 U.S. 440, (1928) -- a case whose continued vitality has been questioned, see Shanahan v. United States, 447 F.2d 1082, 1083, (10th Cir. 1971); Rose v. Commissioner, 55 T.C. 28, 30 (1970).⁹

We hold that the old law prescribed a "de minimis" exception to the section 2035(a) general inclusion rule, and, that being the case, petitioner's constitutional argument becomes moot.

Decision will be entered
for the respondent.

9

Involved in any such question is whether the new law imposes a new tax or is simply the equivalent of a change in the rate or base of any existing tax. See Westwick v. Commissioner, 636 F.2d 291 (10th Cir. 1980), affg. a Memorandum Opinion of this Court. See also United States v. Darusmont, 449 U.S. 292 (1981).

No. 82-1706

Office-Supreme Court, U.S.

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

PETER B. CEPPI, EXECUTOR OF THE ESTATE OF
JANE B. CEPPI, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE

Solicitor General

Department of Justice

Washington, D.C. 20530

(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1706

PETER B. CEPPI, EXECUTOR, OF THE ESTATE OF
JANE B. CEPPI, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question presented in this federal estate tax case is whether an amendment to Section 2035 of the Internal Revenue Code of 1954 (26 U.S.C. & Supp. V), enacted on November 6, 1978, that limited the application of the exclusion from a decedent's gross estate for certain gifts made within three years before death, may constitutionally be applied to gifts made on January 5, 1978.¹

The pertinent facts may be summarized as follows: The decedent, Jane B. Ceppi, died on January 15, 1978. Ten days prior to her death, on January 5, 1978, the decedent made gifts of stock to eight different donees. The value of each gift was \$6,477.75 on January 5, 1978, and \$6,585 on

¹The opinion of the court of appeals (Pet. App. A-1 to A-15) is reported at 698 F.2d 17.

January 15, 1978. On the estate tax return filed by petitioner, the eight gifts were reported as transfers made within three years of death (Pet. App. A-2 to A-3). Under Section 2035(a) of the 1954 Code, such gifts are includable in the gross estate for estate tax purposes, except to the extent excludable under Section 2035(b) (& Supp. V).

Section 2035(b)(2) (& Supp. V), as amended by Section 2001(a)(5) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1848, App., *infra*, 1a, provided an exception for —

any gift excludable in computing taxable gifts by reason of section 2503(b) (relating to \$3,000 annual exclusion for purposes of the gift tax) * * *.

Relying upon this exclusion, petitioner subtracted \$3,000 from the estate tax value of each of the eight gifts (Pet. App. A-3).

The Commissioner disallowed the exclusions claimed by petitioner, and determined an estate tax deficiency of \$7,296 (Pet. App. A-4). In the Commissioner's view, Section 2035(b)(2) of the 1954 Code (& Supp. V) permitted an exclusion only for "*any gift excludable in computing taxable gifts*" (emphasis added). Because each of the decedent's gifts of \$6,477.75 exceeded \$3,000 and none of them was entirely excludable for gift tax purposes, the Commissioner reasoned that no part of any such gift could be excluded for estate tax purposes. The Commissioner's interpretation is commonly referred to as the "de minimis" method, because it allows an exclusion only when the total gifts to a donee during the year are worth \$3,000 or less.

Petitioner, on the other hand, utilized a "subtraction out" method. In essence, petitioner urged that the estate tax exclusion should be determined in the same fashion as the gift tax exclusion. Under Section 2503(b) of the 1954 Code (& Supp. V), App., *infra*, 2a, an exclusion from taxable gifts

is allowed for up to \$3,000 in gifts of certain property to a single donee in a single year, even when the actual gifts exceed \$3,000. Thus, petitioner urged that under Section 2035(b)(2) (& Supp. V), as amended by the Tax Reform Act of 1976, \$3,000 similarly may be "subtracted out" of each gift of \$6,477.75 for purposes of computing the value of the gross estate.

In 1978, however, Congress amended Section 2035(b)(2) (& Supp. V) in order to make it clear that it intended to enact the "de minimis" method applied by the Commissioner. Section 702(f)(1) of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2930, App., *infra*, 1a. See Staff of Joint Comm. on Taxation, 95th Cong., 2d Sess., *General Explanation of the Revenue Act of 1978*, at 429 (Jt. Comm. Print 1979). The 1978 amendment requires inclusion in the gross estate of the entire amount of gifts (and not just the excess of the value of the gifts over \$3,000) whenever the annual gifts to the same donee are in excess of \$3,000. While the Revenue Act of 1978 was signed into law by the President on November 6, 1978, the amendment of Section 2035(b)(2) (& Supp. V) was made effective with respect to the estates of decedents dying after December 31, 1976, but only in connection with gifts made after that date. See the Revenue Act of 1978, Pub. L. No. 95-600, Section 702(f)(2), 92 Stat. 2930, App., *infra*, 3a.

Finally, in 1980, Congress decided to permit executors to elect the "subtraction out" method instead of the "de minimis" method. Section 107(a)(2)(i) of the Technical Corrections Act of 1979, Pub. L. No. 96-222, 94 Stat. 223, App., *infra*, 3a. This election, however, applied only to gifts made during 1977. *Ibid.*²

²According to the pertinent Committee Reports, the reason for permitting such an election was that "[t]he legislative history [of the 1976 amendment] was somewhat ambiguous and could be read to mean that this exception resulted in the inclusion of only the excess of the estate

In the instant case, decedent made the gifts on January 5, 1978, so the special election of the "subtraction out" method was not available to petitioner. In order to prevail, therefore, petitioner had to demonstrate not only that in 1976 Congress had intended the use of the "subtraction out" method, but also that the application of the 1978 amendment to gifts made prior to its enactment was unconstitutional. In this proceeding brought by petitioner in the Tax Court to redetermine the deficiencies, the Tax Court ruled in favor of the Commissioner. Without reaching the question whether the 1978 amendment could constitutionally be applied to gifts made before it was enacted, the Tax Court held that Section 2035(b)(2) (& Supp. V), as amended by the Tax Reform Act of 1976, allowed the computation of the exclusion only under the "de minimis" method and not under the "subtraction out" method (Pet. App. A-26 to A-27).

The court of appeals affirmed the decision of the Tax Court, but on different grounds. Unlike the Tax Court, the court of appeals agreed with petitioner that the "subtraction out" method was proper under the Tax Reform Act of 1976 (Pet. App. A-4 to A-10). However, the Court held (*id.* at

value of all gifts over the amount excludible under the gift tax annual exclusion." S. Rep. No. 96-498, 96th Cong., 1st Sess. 86-87 (1979). The Reports further noted that while the 1978 amendment clarified the meaning of Section 2035(b)(2) (& Supp. V), it was possible that the ambiguity that existed prior to October 1977 — when the House Committee on Ways and Means first considered the clarifying change in Section 2035(b)(2) (see H.R. 6715, 95th Cong., 1st Sess. § 3(f) (1977); H.R. Rep. No. 95-700, 95th Cong., 1st Sess. 73-74 (1977))—could have caused " * * * gifts [to be] made in excess of \$3,000 based upon the assumption that only the excess of the value over \$3,000 would be included in the gross estate as transfers within 3 years of death." S. Rep. No. 96-498, 96th Cong., 1st Sess. 86-87 (1979); H.R. Rep. No. 96-250, 96th Cong., 1st Sess. 65-66 (1979). Thus, out of a sense of fairness, Congress created this limited exception to the "de minimis" rule for gifts made during 1977.

A-13 to A-14) that the application of the 1978 amendment to the decedent's gifts was not unconstitutional because the 1978 amendment had only enlarged the base of the estate tax.

1. The court of appeals correctly held that the application of Section 2035(b) (& Supp. V), as amended by the Revenue Act of 1978, to the decedent's gifts was constitutional. Even on the assumption that the "subtraction out" method was proper under the Tax Reform Act of 1976, the 1978 amendment adopting the "de minimis" method merely limited the availability of the estate tax exclusion. Thus, while under the "subtraction out" method a portion of each gift in issue was includable in the gross estate, under the "de minimis" method each gift was includable in full. The 1978 amendment therefore did not impose a new estate tax nor did it attempt to impose the estate tax on a wholly new type of property or transaction. As the court of appeals correctly observed (Pet. App. A-13), the 1978 amendment did nothing more than enlarge the base of the estate tax.

Petitioner argues that the "retroactive" application of the 1978 amendment to Section 2035(a) is unconstitutional as applied to the decedent's gifts made earlier that year. But, this Court's decision in *United States v. Darusmont*, 449 U.S. 292 (1981), controls this case and squarely supports the ruling below. At issue in *Darusmont* were the income tax provisions of Sections 56 and 57 of the 1954 Code (& Supp. V), as amended by Section 301 of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1549. The amendment decreased the exemption from the minimum tax and also increased the rate of the minimum tax. The Tax Reform Act of 1976 was approved on November 6, 1976; the minimum tax amendments, however, were effective with respect to "items of tax preference for taxable years beginning after December 31, 1975." See the Tax Reform Act of 1976, Pub. L. No. 94-455, Section 301(g)(1), 90 Stat. 1553.

In *Darusmont*, the taxpayer sold certain property during July 1976, thereby realizing a substantial capital gain. If the Tax Reform Act of 1976 had not been subsequently enacted, he would not have been subject to the minimum tax at all, because his 1976 items of tax preference would not have exceeded the exemption. However, because that exemption was reduced by the Tax Reform Act of 1976, thereby enlarging the tax base, he was required to pay a minimum tax of \$2,280, attributable in full to the July sale. 449 U.S. at 293-294.

A unanimous Court upheld the constitutionality of applying the minimum tax amendment to the taxpayer's sales. As the Court reasoned, the practical problems associated with raising revenue and writing tax legislation require that tax statutes often be given effect prior to the date of enactment; such acts customarily have been given effect as of the beginning of the calendar year of enactment; and that considerations of due process are not offended simply because the taxable event antedates the statute. 449 U.S. at 296-297. *Darusmont* fully applies to this case. Here, as there, Congress enlarged the tax base of an already existing tax. In these circumstances, Congress is empowered to legislate with respect to transactions occurring at any time during the entire year of the enactment. See also *Milliken v. United States*, 283 U.S. 15 (1931) (1918 increase in the rate of the estate tax for gifts made in contemplation of death could constitutionally be applied to gifts made in 1916).³

³Petitioner's reliance (Pet. 9, 14) upon *Helvering v. Helmholz*, 296 U.S. 93 (1935), is misplaced. That case involved an estate tax provision enacted in 1926 that sought to tax the retention of a power to alter, amend or revoke a transfer in trust. The Court held that the powers retained over the trust by the donor did not meet the definition of a power to alter, amend or revoke the trust. 296 U.S. at 96. The Court further stated in dicta, that even if the requisite powers had been retained, the application of the provision to powers retained in 1918,

2. Petitioner further argues (Pet. 10-12) that there was inadequate advance notice of the 1978 amendment. In support of this contention, petitioner relies upon *Untermeyer v. Anderson*, 276 U.S. 440, 445-446 (1928), for the proposition that the consideration of a bill in Congress does not provide adequate notice. *Untermeyer*, however, is distinguishable because it ruled invalid the retroactive application of the first wholly new gift tax enacted in 1924, and not merely a change in the rate or base of an existing tax. See *Milliken v. United States*, 283 U.S. 15, 23 (1931). Moreover, assuming arguendo that notice of a pending change in the law is even relevant to the constitutional question, the Court in *Darusmont* stated that public consideration by Congress of a proposed amendment to an existing tax law is sufficient notice. 449 U.S. at 299. The 1978 amendment at issue here was the subject of public discussion in October 1977, more than a year prior to its enactment. See H.R. 6715, 95th Cong., 1st Sess. § 3(f) (1977); H.R. Rep. No. 95-700, 95th Cong., 1st Sess. 73-74 (1977). Thus, even on the assumption that advance notice is relevant, there was adequate advance notice to donors making gifts in 1978 that Congress was considering a change in the statute.

3. Finally, petitioner contends (Pet. 13-15) that this Court should hear this case in order to clarify its holding in *Untermeyer v. Anderson*, *supra*. Petitioner maintains that subsequent cases, including the decision below, have incorrectly suggested that *Untermeyer* at best remains good law only for the proposition that a wholly new type of tax cannot be applied retroactively. See, e.g., *Westwick v. Commissioner*, 636 F.2d 291, 292 (10th Cir. 1980); *First National Bank in Dallas v. United States*, 420 F.2d 725,

when the trust was established, would have violated the Due Process Clause. This case is distinguishable because the gifts at issue here already were subject in large measure to the estate tax.

730 n.8 (Ct. Cl. 1970); *Sidney v. Commissioner*, 273 F.2d 928 (2d Cir. 1960).

But this reading of *Untermeyer* is fully in accord with *Milliken v. United States*, *supra*, where the Court distinguished *Untermeyer* on the ground that neither the gift tax nor any predecessor thereto was in force at the time of the transfers in question. 283 U.S. at 21. *Untermeyer* is distinguishable from the instant case on precisely the same ground.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1983

APPENDIX

STATUTES AND REGULATIONS

Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):

Section 2035 [as amended by Section 2001(a)(5), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1848]. ADJUSTMENTS FOR GIFTS MADE WITHIN 3 YEARS OF DECEDENT'S DEATH.

(a) Inclusion of Gifts Made by Decedent. — Except as provided in subsection (b), the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, during the 3-year period ending on the date of the decedent's death.

(b) Exceptions. — Subsection (a) shall not apply to—

* * * * *

(2) any gift excludable in computing taxable gifts by reason of section 2503(b) (relating to \$3,000 annual exclusion for purposes of the gift tax) determined without regard to section 2513(a).

* * * * *

(b) [as amended by Section 702(f)(1) of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2930] *Exceptions.* — Subsection (a) shall not apply —

* * * * *

(2) to any gift to a donee made during a calendar year if the decedent was not required by section 6019 to file any gift tax return for such year with respect to gifts to such donee.

* * * * *

Section 2503. TAXABLE GIFTS.

* * * * *

(b) [as amended by Section 102(a)(3)(B), Excise, Estate, and Gift Tax Adjustment Act of 1970, Pub. L. No. 91-614, 84 Stat. 1839] *Exclusions From Gifts.* — In computing taxable gifts for the calendar quarter, in the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1971 and subsequent calendar years, \$3,000 of such gifts to such person less the aggregate of the amounts of such gifts to such person during all preceding calendar quarters of the calendar year shall not, for purposes of subsection (a), be included in the total amount of gifts made during such quarter.

* * * * *

Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2930:

Section 702. TECHNICAL, CLERICAL, AND CONFORMING AMENDMENTS TO ESTATE AND GIFT TAX PROVISIONS.

* * * * *

(f) Clarification of the \$3,000 Annual Exclusion From the Rule Including in Gross Estate Transfers Within 3 Years of Death. —

(1) Amendment of Section 2035(b). — Subsection (b) of section 2035 (relating to adjustments for gifts made within 3 years of decedent's death) is amended to read as follows:

“(b) Exceptions. — Subsection (a) shall not apply —

* * * * *

"(2) to any gift to a donee made during a calendar year if the decedent was not required by section 6019 to file any gift tax return for such year with respect to gifts to such donee."

* * * * *

(2) Effective Date. — The amendment made by paragraph (1) shall apply to the estates of decedents dying after December 31, 1976, except that it shall not apply to transfers made before January 1, 1977.

Technical Corrections Act of 1979, Pub. L. No. 96-222, 94 Stat. 223.

Section 107. AMENDMENTS RELATED TO TITLE VII.

(a) In General. —

* * * * *

(2) Amendments related to section 702 of the act.—

* * * * *

(F)(i) If the executor elects the benefits of this subparagraph with respect to any estate, section 2035(b) of the Internal Revenue Code of 1954 (relating to adjustments for gifts made within 3 years of decedent's death) shall be applied with respect to transfers made by the decedent during 1977 as if paragraph (2) of such section 2035(b) read as follows:

"(2) to any gift to a donee made during 1977 to the extent of the amount of such gift which was excludable in computing taxable gifts by reason of section 2503(b) (relating to \$3,000 annual exclusion for purposes of the gift tax) determined without regard to section 2513(a)."

4a

(ii) The election under clause (i) with respect to any estate shall be made on or before the later of —

(I) the due date for filing the estate tax return, or

(II) the day which is 120 days after the date of the enactment of this Act.

* * * * *